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Danger for the Endangered Species Act?: *Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service*

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Danger for the Endangered Species Act?: *Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service*

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INTRODUCTION

In *Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service*,[1] the U.S. Court of Appeals for the Tenth Circuit ruled that the Secretary of Interior must prepare an environmental impact statement (EIS) in compliance with the National Environmental Policy Act (NEPA)[2] before designating areas as "critical habitat" for endangered species under the Endangered Species Act (ESA).[3] At first glance, the Tenth Circuit's decision in *Catron* appears to depart significantly from the line of previous federal cases questioning the applicability of NEPA to actions under the ESA. However, upon further examination, the effect of the holding is relatively narrow in scope, since it applies only to federal environmental agencies when actions they undertake are major federal actions which adversely affect the quality of the human environment.[4] Ultimately, the most significant result of the Tenth Circuit's decision may be to encourage all federal environmental agencies to prepare an EIS prior to undertaking any project intended to benefit the environment—a result harboring both negative and positive implications for federal environmental policy.

Despite the apparent simplicity of its decision that the procedures of NEPA apply to some actions under the ESA, the overall effect of

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[1] Catron County Board of Comm'rs, N.M. v. United States Fish and Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996).

[2] 42 U.S.C. §§ 4321-70(d) (1994).

[3] 16 U.S.C. §§ 1531-44 (1994).

[4] *Catron*, 75 F.3d at 1439.

Catron may be nullified by the procedural construction of the ESA. The court's creative approach in granting the plaintiffs standing to sue in this case may also limit application of the holding in jurisdictions outside the Tenth Circuit. While the court examined the legislative record to determine whether Congress intended the ESA to trigger the requirements of NEPA,[5] its inquiry left unanswered the question of whether Congress actually intended for NEPA to apply to federal *environmental* agencies.

If interpreted too broadly, the *Catron* decision could significantly affect the Secretary of the Interior's ability to achieve the primary goal of the ESA.[6] The *Catron* court did not conclude that all designations of critical habitat should be deemed "major federal actions" for the purposes of NEPA.[7] The court ruled only that under extraordinary circumstances, such as those in *Catron* where the designation of critical habitat could result in an actual physical injury to the human environment, the agency designating the critical habitat must fulfill the obligations of NEPA.[8]

From an environmental perspective, however, the *Catron* court's decision lacks an adequate balancing test between human property interests and the interest of preventing the extinction of critically endangered species.[9] Under the *Catron* decision, the Secretary of the Interior (Secretary) cannot take any action to prevent the extinction of an endangered species until he completes the preparation, notice and comment proceedings, and revision of a NEPA environmental assessment (EA).[10] Such delays could lead to the unnecessary loss of some species of plants or animals forever, which could result in adverse, far-reaching, and irreversible ramifications for the environment and for the interrelated fitness of human ecological health.[11]

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[5] *Id.*

[6] 16 U.S.C. § 1531(b) ("to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.").

[7] *Catron*, 75 F.3d at 1439.

[8] *Id.*

[9] *Id.*

[10] *Id.* ("When the environmental ramifications of such designations are unknown, we believe that Congress intends that the Secretary prepare an EA . . . .").

[11] For example, while the threatened extinction of the Northern Spotted Owl certainly endangered the continued existence of that one species of bird, the entire ecosystem within the owl's habitat was also threatened. The Spotted Owl holds a controlling or "keystone" position among the rest of the species in the food web of its ecosystem. The disappearance of the owl would lead to an overpopulation of the smaller animals on which it feeds. This would, in turn, lead to the exhaustion of their food supplies and the eventual disappearance of other plants and animals that

I. THE *CATRON* CASE HISTORY

The *Catron* case involved a dispute between the Secretary of the Interior and the County Commission of Catron County, New Mexico.[12] In 1985, the Secretary proposed listing two species of fish, the loach minnow and spikedace, as endangered species and establishing critical habitat areas for them in the Gila River system.[13] Portions of the river system run through Catron County.[14] In 1986, the Secretary promulgated regulations listing both fish as threatened, but he delayed designating critical habitat for the two species for a year.[15] In delaying his final decision to designate the areas of critical habitat, the Secretary cited his primary concern as "the complexity of the economic analysis that must accompany the final rule designating critical habitats and the large number of comments and data received on these habitats."[16]

On April 7, 1994, after nearly eight years of subsequent delays and rescheduling, the Secretary issued notice of final designation of critical habitat for the spikedace and loach minnow along the Gila River system in Catron County and elsewhere throughout New Mexico and Arizona.[17] Some seventy-four miles of the Gila, San Francisco and Tularosa rivers and the Dry Blue Creek in Catron County were affected by this designation.[18] Later that month Catron County filed a motion to enjoin the Secretary from enforcing the critical habitat designation.[19]

The County Board of Commissioners claimed that the Secretary had failed to prepare an EA in accordance with the provisions of NEPA.[20] They asserted that the Secretary's designation of the critical habitat area would force Catron County to abandon flood control operations along the Gila River system, which would cause flood

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depend upon those species. AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 121 (Penguin Books 1992).

[12] Catron County Bd. of Comm'rs, New Mexico v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1432-33 (10th Cir. 1996).

[13] *Id.* at 1432 (citing to 50 Fed. Reg, 25,380 (Loach Minnow), 25,390 (Spike Dace) (1985)).

[14] Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Spike Dace, 51 Fed. Reg. 23,769 at 23,770 (1986) (to be codified at 50 C.F.R. pt. 17).

[15] *Catron*, 75 F.3d at 1432.

[16] 51 Fed. Reg. 23,769 at 23, 771.

[17] *Catron*, 75 F. 3d at 1433.

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Threatened Loach Minnow, 59 Fed.Reg. 10,898 (1994) (to be codified at 50 C.F.R. pt. 17).

[19] *Catron*, 75 F.3d at 1433.

[20] *Id.*

damage to land owned by the county.[21] In October 1994, the United States District Court for the District of New Mexico found that the Secretary had not complied with NEPA by failing to prepare an EA before designating critical habitat for the spikedace and loach minnow under the applicable provisions of the ESA.[22] Based on this finding, the court granted the county's motion for partial summary judgment and granted injunctive relief against the Secretary to prevent him from designating the area as critical habitat.[23]

In response to the district court's ruling, the Secretary then sought, and was granted, an interlocutory appeal before the United States Court of Appeals for the Tenth Circuit.[24] The court agreed with the district court and sustained both the district court's grant of injunctive relief in favor of Catron County and the district court's ruling that the Secretary must comply with NEPA when designating critical habitat under the ESA if such action is a "major federal action significantly affecting the quality of the human environment."[25]

This Comment first examines the *Catron* court's affirmation of the county's standing to sue the U.S. Fish and Wildlife Service, reviewing the county's assertion of injury-in-fact, and examining the Tenth Circuit's interpretation of relevant sections of the ESA. Next, the Comment looks at the general applicability of NEPA to actions of the Department of the Interior (DOI) under the ESA and the required interaction, under ESA § 1536, between the DOI and other federal agencies. Finally, the Comment discusses the long term significance of the *Catron* decision and the possible outcome of an appeal before the United States Supreme Court.

A. Standing

In *Sierra Club v. Morton*[26] the Supreme Court defined "standing to sue" to mean that "[the plaintiff] party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[27] Twenty years later in *Lujan v. Defenders of Wildlife*,[28] the Court, citing *Sierra Club v. Morton*, set down three elements, establishing the absolute minimum constitutional requirements for a plaintiff to maintain standing to sue.[29] The Court stated:

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1432.

[25] Catron County Bd. of Comm'rs, New Mexico v. United States Fish and Wildlife Serv, 75 F.3d 1429, 1439 (10th Cir. 1996).

[26] Sierra Club v. Morton, 405 U.S. 727 (1972).

[27] *Id.* at 731-32.

[28] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[29] *Id.* at 560.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[30]

The *Catron* court endorsed the *Defenders of Wildlife* standing test and applied the test to the circumstances surrounding the plaintiff's claims.[31]

The *Catron* court's first task in establishing plaintiff standing was to determine whether the plaintiff had suffered an injury in fact or whether the plaintiff would likely suffer some injury in fact in the near future as a result of the Secretary's actions. From the facts of the case it appeared that the plaintiff county based its claim of "injury in fact" on an injury that it had not yet suffered, nor appeared certain to suffer in the foreseeable future.[32] This runs counter to the first two requirements of standing outlined by the *Defenders of Wildlife* Court, outlined *supra*.[33] In *Warth v. Seldin*,[34] the Court explained that this standard of proof must apply to allegations of injury, because, "absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of a real need to exercise the power of judicial review or that relief can be framed no (broader) than required by the precise facts to which the court's ruling would be applied."[35]

In *Catron*, the plaintiff claimed that the designation of critical habitat would prevent the government from operating flood control measures along the Gila River system. This in turn, they claimed, would lead to flooding which would damage a large portion of property owned by the county, such as the fairgrounds, bridges, and several

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[30] *Id.* at 560-61 (citations omitted).

[31] Catron, 75 F.3d at 1433 (citing *Defenders of Wildlife*, 504 U.S. 555 at 559 ("[t]he party invoking federal jurisdiction bears the burden of establishing an actual or imminent injury that is concrete and particularized rather than conjectural or hypothetical; a causal connection that is 'fairly traceable' to the conduct complained of; and a likelihood of redressability in the event of a favorable decision.")).

[32] *Id.* at 1433.

[33] *Defenders of Wildlife*, 504 U.S. 555 at 559 (emphasis added).

[34] Warth v. Seldin, 422 U.S. 490 (1975).

[35] *Id.* at 508.

county roads.[36] The court accepted the plaintiff's allegations at face value, and found the alleged injury to be an "injury in fact."[37] In support of this contention, the court cited §1536(a)(2) of the ESA, which reads in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section . . . .[38]

The *Catron* court interpreted this language in §1536 to automatically prohibit all further federal actions within an area whenever the Secretary designates that area as critical habitat.[39] The court stated that "contrary to the suggestion of the Secretary. . .[designation of an area as critical habitat] effectively prohibits all subsequent federal or federally funded or directed action likely to destroy or disrupt the habitat."[40] However, the court cited no cases tried within the Tenth Circuit or any other jurisdiction that lend support to this novel interpretation of the language of 16 U.S.C. § 1536(a)(2).

The court did not explain its conclusion that § 1536(a)(2) effectively prohibits all federal activity within a critical habitat area, other than to cite the statute itself.[41] This is perhaps the weakest link in the court's chain of reasoning. Interpreted in a more straightforward manner, 16 U.S.C. § 1536(a)(2) gives the Secretary discretion to exclude a federal project from the critical habitat area. The statute does not, however, automatically exclude all federal or federally-funded projects from the area, nor does it require the Secretary to declare a moratorium on all present and future projects in the area.[42] A federal

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[36] *Catron*, 75 F.3d at 1433 (citing to 50 Fed. Reg. 25,380 (Loach Minnow), 25,390 (Spike Dace) (1985)).

[37] *Id.*

[38] 16 U.S.C. § 1536(a)(2) (1994).

[39] *Catron*, 75 F.3d 1429 at 1437 ("The designation of critical habitat effectively prohibits all subsequent federal or federally funded or directed actions likely to affect the habitat.").

[40] *Id.* at 1434.

[41] *Id.*

[42] 16 U.S.C. § 1536(a)(2).

agency that wants to authorize, fund or carry out a project in the critical habitat area may still do so.[43] However, section 1536(a)(2) requires the agency to consult with the Secretary in order to modify the project to insure that it will not threaten the survival of the endangered species or destroy or adversely modify its habitat.[44]

The Secretary had made no statement or other indication to the effect that he intended to prohibit all flood control projects in Catron County after designating the critical habitat area. Therefore, the plaintiff county had no affirmative evidence to support its contention that the injuries complained of would likely happen. Thus, under the second part of the *Defenders of Wildlife* standing test, the plaintiff could not affirmatively prove that the injuries in its complaint were either "concrete" or "particularized."[45] Therefore, the plaintiff failed the Supreme Court's standing test, and the Tenth Circuit should have dismissed the plaintiff's claims, because the *Defenders of Wildlife* Court asserted that the burden of establishing these factors lies with the party seeking federal jurisdiction.[46]

The *Catron* court failed to address an additional concern that may have altered the standard of proof in the case. The cause of the plaintiff county's asserted injury would arise only from the interaction of the Secretary and an unnamed federal agency not present in the *Catron* case. In a suit challenging the legality of a government action or inaction, if the alleged injury arises from the government's allegedly illegal regulation of another party, the court may require the plaintiff to produce more substantial evidence to demonstrate that the offending government action caused his injury or that action by the court will redress his alleged injury.[47] The Court in *Warth* explained that if a defendant in a civil case is only indirectly to blame for the plaintiff's claimed injury the court will not preclude the plaintiff from seeking redress, but the court may demand that the plaintiff produce more evidence to demonstrate that he has standing to sue.[48] The court in *Catron* should have applied this more difficult standard of proof to the county's claims of injury, because according to the relevant sections of the ESA, the flood damage would only result from a failure of the Secretary of Interior to develop a mitigation agreement with the federal

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[43] *Id.*

[44] *Id.*

[45] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[46] *Id.* at 561.

[47] *Id.* at 562.

[48] Warth v. Seldin, 422 U.S. 490, 505 (1975) ("The indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. But it may make it substantially more difficult to meet the minimum requirement[s] of Art. III. . . .") (citation omitted).

agency that operates the flood control measures in the county.[49]

Under ESA § 1536(a)(2), once the Secretary consults with the federal agency in charge of flood control for *Catron* County, he may recommend that no changes be made to the Catron County flood control measures.[50] Working with the Army Corps of Engineers, the Secretary might be able to develop a plan which would maintain flood protection for the county's property while still protecting the endangered fish and their habitat.[51] Since all federal agencies depend upon Congress for funding, and congressional funding often hinges upon public support of the agency in question, no federal agency can expect to withstand the political ramifications of an agency action that adversely affects the lives of hundreds or thousands of citizens. Such political considerations would necessarily force the Secretary to balance the environmental and economic interests of the citizens with the interest of the federal government in protecting the endangered species before making a decision to prevent Catron County from operating any flood control measures along the Gila River system. The Tenth Circuit could have served the public interest in a better way by allowing the Secretary to engage in this logical thought process before imposing its own judicial solution.

An added layer of procedure within the ESA provides a final administrative remedy beyond the final agency action of designating a critical habitat area. Even if the Secretary prohibits a federal agency from proceeding with a planned action within a critical habitat area, the federal agency may appeal the Secretary's decision to another authority under the ESA.[52] In the 1978 ESA amendments, Congress created the Endangered Species Committee (ESC).[53] The ESC may hear and decide appeals from decisions of the Secretary regarding federal projects in critical habitat areas through a quasi-judicial process.[54] The ESC's members include the Secretary of the Interior as chair, the Secretary of the Army (as many federal construction projects are carried out by the Army Corps of Engineers), the Chairman of the Council of Economic Advisors, the Secretary of Agriculture, the Administrator of the National Oceanic and Atmospheric Administration, the Administrator of the Environmental Protection Agency (EPA), and a presidentially-appointed representative from each affected State.[55] Subsection (h) of

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[49] 16 U.S.C. § 1536(h) (1996).
[50] 16 U.S.C. § 1536(a)(2).
[51] 16 U.S.C. § 1536(h).
[52] 16 U.S.C. § 1536(g) (1996).
[53] 16 U.S.C. § 1536(e) (1996).
[54] 16 U.S.C. § 1536(e)(8)-(10).
[55] 16 U.S.C. § 1536(g)(3)(A)-(G) and (5)(B).

ESA § 1536 allows the ESC to grant a federal agency an exemption from consulting with the Secretary of Interior if:

> there are no reasonable and prudent alternatives to the agency action; the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and *such action is in the public interest*; the action is of regional or national significance; and neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, *as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.*[56]

While the Secretary of Interior may not reverse a final decision of the Committee,[57] this provision confirms that all final decisions of the Committee are subject to judicial review.[58] It might be argued, therefore, that Congress contemplated that the ESC's final decision would constitute the "final agency action" with regard to designations of critical habitat. If this was Congress' intent, then the case in *Catron* had not reached finality, and therefore, the Tenth Circuit should have overturned the lower court's decision.

In *FTC v. Standard Oil Co. of California*,[59] the U.S. Supreme Court found that judicial intervention in cases where a final agency action has not taken place denies the agency the opportunity to correct its own mistakes.[60] The Court also stated that premature judicial interference leads to piecemeal review and wasted judicial resources—the same legal theory which governs interlocutory appeals.[61] Finally, the Court found that § 706 of the Administrative Procedure Act (APA)[62] provides an adequate remedy to a person aggrieved by an

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[56] 16 U.S.C. § 1536(h)(1) (emphasis added).

[57] 16 U.S.C. § 1536(h)(1)(B) ("Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.").

[58] 16 U.S.C. § 1536(n) ("Any person, as defined by section 1532(13) of this title, may obtain judicial review . . . of any decision of the Endangered Species Committee under subsection (h) of this section . . . .").

[59] FTC v. Standard Oil Co., 449 U.S. 232 (1980).

[60] *Id.* at 242.

[61] *Id.*

[62] 5 U.S.C. §§ 551-706 (1994).

agency's actions by allowing a court to "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law."[63]

B. Applying The National Environmental Policy Act To Federal Actions Under the Endangered Species Act

A federal agency may be excused from the requirements of NEPA for two specific reasons. An agency may be excused from complying with NEPA if, by complying, the agency would be forced to violate its own enabling statute.[64] A federal agency may also be excused from preparing an EIS under NEPA if the agency action requires that the agency make inquiries and assessments that essentially replace or duplicate the functions of the NEPA process.[65]

1. Statutory Conflicts

In *Flint Ridge Development Co. v. Scenic Rivers Ass'n,*[66] the Court found that a thirty-day time limit of the Interstate Land Sales Disclosure Act (Disclosure Act)[67] effectively precluded the Secretary of Housing and Urban Development (HUD) from developing an EIS prior to fulfilling his duties under the Disclosure Act.[68] The Court found that even the most experienced agency staff may need up to five months to prepare the first draft of even the most simple EIS.[69] Therefore, the Court declared that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[70] The Court noted that it was virtually "inconceivable" that an EIS could be drafted, circulated, commented upon, and then reviewed and revised within thirty days.[71]

Three years prior to *Flint Ridge*, the Court established that NEPA holds a secondary status with regard to statutory authorizations. In *United States v. SCRAP*,[72] the Court found that when a statutory conflict with the agency's authorizing legislation prohibits or makes compliance

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[63] FTC v. Standard Oil Co., 449 U.S. at 245 (citation omitted).

[64] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976).

[65] Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996); Pacific Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981); Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986).

[66] *Flint Ridge*, 426 U.S. 776 (1976).

[67] 15 U.S.C. §§ 1701-20.

[68] *Flint Ridge*, 426 U.S. at 788.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 788-91.

[72] United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

with NEPA impossible, the agency is excused from complying with NEPA.[73] The Court relied in part on *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission,*[74] a decision by the United States Court of Appeals for the District of Columbia two years prior to its decision in *SCRAP.*[75] The court in *Calvert Cliffs* declared that "the [NEPA] Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, *unless there is a clear conflict of statutory authority.*"[76]

The *Catron* court found that the Secretary did not assert the same type of conflict-of-statutes argument the HUD Secretary asserted in *Flint Ridge.*[77] Rather, the Secretary in *Catron* argued that the "similarity of the statutes' procedures, together with congressional failure to respond to judicial and executive announcements of NEPA noncompliance, evidence Congress' implicit intent to 'displace NEPA's procedural and informational requirements.'"[78] Therefore, the *Catron* court did not directly address the *Flint Ridge* question. However, the conflict-of-statutes question becomes more relevant when considering the applicability of NEPA to the ESA. A time-related conflict effectively equates this concern with the HUD Secretary's argument in *Flint Ridge.* Under the ESA, the Secretary of Interior has the option to exclude certain areas from designation as critical habitat if he finds "that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat. . . ."[79] However, he may not exclude any part of the critical habitat if he determines that "the failure to designate such area as critical habitat will result in the extinction of the species concerned."[80] This language indicates that Congress gave the Secretary discretion to consider the costs and benefits of designating a particular area as critical habitat, but Congress expressly prohibited him from considering such issues when a species is in danger of becoming extinct.[81] This is both logical and reasonable since the Secretary may change the designation if, after a period of time, the species is restored to non-endangered status.[82] The same corrective action cannot bring a

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[73] *Id.* at 671 ("NEPA must give way . . . . [The Act] was not intended to repeal by implication any other statute.").

[74] Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (1971).

[75] *SCRAP*, 412 U.S. at 669.

[76] *Calvert Cliffs'*, 449 F.2d at 1115 (emphasis added).

[77] Catron County Bd. of Comm'rs, N. M. v. United States Fish and Wildlife Serv, 75 F.3d 1429, 1436-37 (10th Cir. 1996).

[78] *Id.* at 1437 (citation omitted).

[79] 16 U.S.C. § 1533(b)(2) (1996).

[80] *Id.*

[81] *Id.*

[82] 16 U.S.C. § 1533(b)(3)(B) (1996).

species back from extinction.

A species threatened with immediate extinction may not be able to survive for the amount of time required to prepare an EIS. To allow a species to become extinct while preparing an EIS that (under the statutory construction of the ESA) the Secretary could not consider, would undermine the special protection Congress intended to provide such critically threatened species in § 1533(b)(2) of the ESA.[83] In *Catron,* the Secretary did not assert that either the spikedace or loach minnow were in immediate danger of becoming extinct. However, if other courts—adopting *Catron* as precedent—decide that the Secretary should comply with NEPA whenever he designates critical habitat, the added time and procedural requirements may prevent the Secretary from taking more immediate steps to prevent the nation's most endangered species from becoming extinct.

2. Functional Equivalence

Agencies may also be excused from NEPA compliance when the agency action is undertaken "subject to rules and regulations that essentially duplicate the NEPA inquiry."[84] The U.S. Court of Appeals for the Ninth Circuit examined this form of NEPA exemption in the 1986 case of *Merrell v. Thomas.*[85] In its decision the court ruled that Congress intended for the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[86] to replace of the requirements of NEPA.[87] When Congress amended FIFRA in 1972, NEPA had been in effect for two years. The Court of Appeals for the Ninth Circuit stated that, "Congress gave no indication that it thought NEPA would apply. Instead, Congress created a registration procedure within FIFRA to ensure consideration of environmental impact—a procedure that apparently made NEPA superfluous."[88] The FIFRA registration procedure required the EPA Administrator to place a notice in the Federal Register; "to act 'as expeditiously as possible'" in making a decision to approve or disapprove the pesticide, and to make information available to the public within thirty days of his decision.[89]

In contrast to the FIFRA registration requirements, the ESA requires the Secretary to consider comments from interested parties

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[83] 16 U.S.C. § 1533(b)(2).

[84] Catron County Bd. of Comm'rs, N.M. v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1435 (10th Cir. 1996).

[85] Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986).

[86] 7 U.S.C. §§ 136-136y (1994).

[87] *Merrell*, 807 F.2d at 778.

[88] *Id.*

[89] *Id.*

prior to listing a species as endangered or designating critical habitat.[90] Section 1533(b)(5) of the ESA requires the Secretary to provide notice to all states, and all jurisdictions within those states, where the species are believed to exist.[91] The states and all affected jurisdictions are then allowed to comment on the proposed listing, and upon petition of any interested party the Secretary must hold a public hearing on the proposed listing in order to allow affected parties to express their concerns in person.[92] The ESA also provides that the Secretary may take as long as ninety days—sixty days longer than the FIFRA regulations—before making a final determination to list the species as endangered or to designate critical habitat.[93]

The *Merrell* court found that the registration requirements of FIFRA served essentially the same purpose as the EA process of NEPA, and, therefore, an EA was unnecessary.[94] However, the *Catron* court did not adapt the *Merrell* decision to its case. The *Catron* court agreed with the Secretary's contention that the habitat designation procedures under the ESA duplicate some of the requirements of NEPA.[95] The court stated that, "it is clear that the provisions of the ESA governing the designation of critical habitat instruct the Secretary to follow procedures that to some extent parallel and perhaps overlap the requirements imposed by NEPA."[96] However, the court found that the ESA requirements only partially fulfilled the primary purposes of NEPA.[97]

A year before the *Catron* decision, the Court of Appeals for the Ninth Circuit addressed an identical conflict between the requirements of NEPA and the Secretary of Interior's duties under the ESA in *Douglas County v. Babbitt.*[98] In *Douglas County*, the Secretary sought to designate some 11 million acres of federal lands in Oregon as critical habit for the endangered spotted owl.[99] In the notice of his intent to designate the critical habitat area, the Secretary declared that, according to a 1983 policy promulgated by the Department of Interior, he was not

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[90] 16 U.S.C. § 1533(b)(5).

[91] *Id.* § 1533(b)(5)(A)(ii).

[92] *Id.* §1533(b)(5)(A)-(E).

[93] *Id.* § 1533(b)(5)(A).

[94] Merrell v. Thomas, 807 F.2d 776, 780 (9th Cir. 1986).

[95] Catron County Bd. of Comm'rs, N.M. v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1437 (10th Cir. 1996).

[96] *Id.*

[97] *Id.* (quoting Weinberger v. Catholic Action, 454 U.S. 139, 143 (1981) ("'[NEPA's purpose is] to inject environmental consideration into the federal agency's decision making . . . and inform the public that the agency has considered the environment.")).

[98] Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

[99] *Id.* at 1498.

required to follow NEPA when designating critical habit under ESA.[100] The Secretary based his assertion on a policy founded on both the Sixth Circuit's decision in *Pacific Legal Foundation v. Andrus*,[101] and a letter[102] from the Council on Environmental Quality (CEQ) urging the Secretary to cease preparing EISs in conjunction with designations of critical habitat.[103]

In *Pacific Legal Foundation* the Sixth Circuit held that NEPA was not applicable to the Secretary's listing of seven species of mussels as endangered because:

> First, filing an impact statement does not and cannot serve the purposes of the Endangered Species Act . . . . Second . . . NEPA is primarily a procedural statute to insure that an agency considers the environmental impact [of its actions] . . . . Third, the Secretary's action in listing species as endangered or threatened furthers the purposes of NEPA even though no impact statement is filed.[104]

While the *Catron* court recognized the *Pacific Legal Foundation* decision as valid in some cases, the Tenth Circuit distinguished the case from the facts in *Catron* because the plaintiffs in *Pacific Legal Foundation* claimed that their injuries resulted from the Secretary's act of *listing the endangered species* without first preparing an EA. In *Catron,* the plaintiff county claimed that its injury would arise from the Secretary's failure to prepare an EA prior to *designating critical habitat.*[105] This distinction between the two actions of the Secretary is a subtle one since the Secretary's duty to designate critical habitat is nondiscretionary under § 1533(a)(3) of the ESA.[106] Therefore, he must always perform both. The scope of comment on this portion of the *Catron* decision is limited, since the court did not explain its reasons for its belief that the Sixth Circuit's holding in *Pacific Legal Foundation* should not extend to both the listing of species and to the designation of

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[100] *Id.*

[101] Pacific Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981).

[102] Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions Under the Endangered Species Act, 48 Fed. Reg. 49,244 (1983) (to be codified at 50 C.F.R. pt. 17).

[103] Catron County Bd. of Comm'rs, N. M. v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996).

[104] *Pacific Legal Found.*, 657 F.2d at 835-37.

[105] *Catron*, 75 F.3d at 1438.

[106] 16 U.S.C. § 1533(3)(A) ("The Secretary . . . shall concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat . . . .").

critical habitat.[107]

In its 1983 letter to the Secretary of Interior, the CEQ directed the Secretary to stop preparing an EIS when listing endangered species or designating critical habitat.[108] According to the Supreme Court in *Andrus v. Sierra Club*, the CEQ's "interpretation of NEPA is entitled to substantial deference."[109] However, the *Catron* court found the CEQ letter "unpersuasive" because Congress did not take the opportunity five years later to incorporate the CEQ's interpretation (or the subsequent Department of Interior policy) into the ESA when it amended §1533 in 1988.[110]

The *Douglas County* court upheld the Secretary's determination that the procedures he is required to follow in designating critical habitat under the ESA effectively displace the environmental assessment processes of NEPA.[111] The court found that Congress intended for the procedures of the ESA to displace the NEPA requirements.[112] However, the Tenth Circuit refused to apply the *Douglas County* holding to the *Catron* case. Rejecting the Secretary's view that the provisions of the ESA and NEPA are mutually exclusive, the court found that "compliance with NEPA will further the goals of the ESA."[113] The court asserted that the process of preparing an EIS will ensure that the Secretary fulfills the goals of ESA while complying with NEPA "'to the fullest extent possible.'"[114] The court also believed that forcing the Secretary to prepare an EIS for designations of critical habitat would help to preclude unnecessary judicial review.[115] The court stated that, "appellants' theory would cast the judiciary as the final arbiter of what federal actions protect or enhance the environment, a role for the which the courts are not suited."[116] This argument is plausible because the information accumulated by the Secretary in producing an EA would serve as "sufficient evidence" for purposes of § 706(2)(E) of the APA, and would likely prevent a court from setting aside a critical habitat

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[107] *Catron*, 75 F.3d at 1439 ("We conclude that the legislative history does not, as Appellants contend, indicate congressional endorsement of the Secretary's announcement in the Federal Register of NEPA noncompliance or silent acquiescence in applying and extending the holding of *Pacific Legal Foundation* to designations of critical habitat.").

[108] Douglas County v. Babbitt, 48 F.3d 1495, 1498 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

[109] Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

[110] *Catron*, 75 F.3d at 1438-39.

[111] *Douglas County*, 48 F.3d at 1507.

[112] *Id.* at 1507-08 ("NEPA does not apply to actions that do not change the physical environment, and to apply NEPA to the ESA would further the purposes of neither statute.").

[113] *Catron*, 75 F.3d at 1436.

[114] *Id.* at 1437 (quoting 42 U.S.C. § 4332(C)).

[115] *Id.*

[116] *Id.*

designation based on such evidence.[117]

In *Catron*, the Department of Interior argued that Congress' failure to take legislative action to reverse the Secretary's 1983 policy evidenced congressional approval of the policy and supported the Secretary's refusal to prepare an EIS.[118] Specifically, the Secretary argued that when Congress undertook the 1988 amendments to the ESA, it could have amended § 1533 to require the Secretary to perform an EIS prior to designating critical habitat.[119] However, Congress chose not to address the issue. Therefore, the Secretary believed Congress' silence regarding the 1983 policy indicated agreement with, and continued support of, the policy.[120]

The *Catron* court disagreed with the Secretary's theory that Congress' silence indicated support of the 1983 policy, stating that, "the failure to revise, unaccompanied by any evidence of congressional awareness of the interpretation, is not persuasive evidence."[121] The court agreed that Congress had amended parts of § 1533 in 1988, but it felt that since Congress did not specifically address the critical habitat provisions in § 1533 it could not be deemed to have given its consideration or any type of silent approval to the policy.[122] While it may be argued that Congress intentionally remained silent as to the critical habitat provisions in order to maintain the Department of Interior's interpretation of its duties under NEPA, the *Catron* court demanded some tangible evidence that at least some members of Congress considered the effect of not amending them to conform with the Department of Interior's policy and the CEQ directive.[123] The court stated that, "a proponent of congressional acquiescence . . . bears the burden of showing 'abundant evidence that Congress both contemplated and authorized' the previous non-congressional interpretation in which it now finds acquiescence."[124] The court then proceeded to examine the legislative history of the ESA to determine whether Congress intended NEPA to apply to federal actions under the ESA.[125] The court found that, "Congress apparently intended the Secretary in some cases to prepare an impact statement when designating critical habitat under the

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[117] 5 U.S.C. § 706(2)(E).

[118] *Catron*, 75 F.3d at 1438.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Catron*, 75 F.3d at 1438 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986)).

[125] *Id.* at 1439.

ESA."[126]

In fact, Congress had considered an amendment to §1533 during the 1978 ESA Amendment debates.[127] On July 19, 1978, Senator McClure of Idaho introduced an amendment[128] that would have added a new section to the ESA, specifically defining designations of critical habitat as "major federal actions" for the purposes of NEPA.[129] In his supporting statement, Senator McClure indicated that he was concerned with what he perceived as an inherent inflexibility in the procedural requirements of the ESA.[130]

Senator Wallop of Wyoming objected to McClure's amendment on grounds that it would force the Secretary to perform an EIS when designating any area of critical habitat.[131] This concern aside, Senator Wallop apparently agreed with Senator McClure's contention that an EIS should be prepared before the Secretary designates at least *some* areas as critical habitat.[132] He also concurred with Senator McClure's remarks that each case should be judged individually on its own particular facts.[133] Senator McClure withdrew his amendment, yet the *Catron* court deemed this exchange between Senators McClure and Wallop as evidence that, "Congress contemplated and intended secretarial compliance with NEPA when designating habitat under ESA."[134] However, if other Senators present during the debate deemed the question raised by Senator McClure worthy of an affirmative rule, why did they not take the opportunity to change the statute at that time?

Senator McClure could have revised his amendment to address Senator Wallop's concerns had he felt it necessary. The fact that the question was considered and withdrawn would seem, more logically, to

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[126] *Id.*

[127] 124 CONG. REC. 21,588 (1978).

[128] That amendment stated in pertinent part:

> Notwithstanding any other provision of this [Endangered Species] Act or any other law, an action taken by any Federal department or agency involving the designation of any areas as critical habitats . . . shall be deemed to be a major federal action significantly impacting the human environment requiring the filing of an environmental impact statement under the National Environmental Policy Act of 1969 . . . . *Id.*

[129] *Id.* (statement of the Presiding Officer).

[130] 124 CONG. REC. 21,589 (1978) (statement of Senator McClure) ("But I do believe that the agency that makes the designation . . . must ultimately be able to bear the burden of inquiry that they have considered not just the welfare of the endangered species, but the relative value of that minute subcategory with overriding considerations, if, indeed, they exist.").

[131] *Id.* (statement of Senator Wallop) ("It is possible that there will be many that will not be major Federal actions.").

[132] *Id.* (statement of Senator Wallop).

[133] *Id.* (statement of Senator Wallop) ("It would be a determination for the courts to make as to whether or not anything that we could determine in any given designation would be a major Federal action . . . . The act is silent. It neither encourages nor prohibits an EIS requirement.").

[134] Catron County Bd. of Comm'rs, N. M. v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1439 (10th Cir. 1996).

indicate that Congress rejected the contention that NEPA applies to designations of critical habitat. In *Pacific Legal Foundation*, the United States Court of Appeals for the Sixth Circuit found that the exchange between Senators McClure and Wallop established only that the ESA did not expressly forbid the Secretary from preparing an impact statement before designating critical habitat.[135] The court found a more persuasive indication of Congress' intent in an amendment adopted later the same day of the McClure-Wallop exchange.[136] That amendment required a federal agency seeking an exemption from § 1536(a)(2) to file an EIS along with its petition to the ESC.[137]

Although the *Catron* court examined the legislative history of the ESA,[138] it did not make a similar inquiry into the background of NEPA. The *Pacific Legal Foundation* court did examine NEPA's legislative history and found that Congress did not intend for NEPA to apply to federal agencies "whose function was to protect the environment."[139] The *Pacific Legal Foundation* court also found that the ESA, which was enacted three years after NEPA, did not even mention NEPA or the requirements of an environmental assessment.[140]

The legislative history of NEPA shows that some congressmen worried that NEPA would interfere with federal environmental agencies.[141] Prior to adopting NEPA, some senators expressed concern with the effect that the proposed Act would have on the federal agencies charged with protecting the environment.[142] However, Senator Muskie assured those who expressed such concerns that NEPA was not designed to impose additional procedures upon environmental agencies.[143] Later that day, in response to several specific questions regarding the possible effects of NEPA on environmental agencies (such as the Federal Water Pollution Control Agency), Senator Muskie again asserted that NEPA would not encumber environmental agencies with

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[135] Pacific Legal Found. v. Andrus, 657 F.2d 829, 840 (6th Cir. 1981).

[136] *Id.*

[137] *Id.*

[138] *Catron*, 75 F.3d at 1439.

[139] *Pacific Legal Found.*, 657 F.2d at 838 ("Though not without ambiguity, the legislative history suggests that NEPA was not intended to be applied to agencies whose function was to protect the environment.").

[140] *Id.* at 838-39.

[141] 115 CONG. REC. 40,415 (1969).

[142] *Id.*

[143] 115 CONG. REC. 40,415 (1969) (statement of Senator Muskie ("Many existing agencies have important responsibilities in the area of environmental control. The provisions of [NEPA] section 102 (as well as 103) are not designed to result in any change in the manner in which they carry out their environmental protection authority.").

additional responsibilities.[144] The *Pacific Legal Foundation* court found additional support for the contention that Congress did not intend for NEPA to affect environmental agencies in Representative Dingell's supporting statements made just two days after Senator Muskie's defense of the proposed Act.[145]

Congress could have amended NEPA, expressly listing those federal agencies which must comply with NEPA and those which are excluded from NEPA's requirements or expressly listing all federal agency actions which constitute "major federal actions" for the purposes of NEPA. However, Congress regularly mandates new federal agency procedures, and Congress also creates new federal agencies from time to time. If NEPA contained such a list, Congress would have to amend the Act each time it mandated a new procedure or created a new executive agency to insure that the requirements of NEPA would apply to the new procedures or to the agency. Perhaps Congress did not want to risk amending NEPA more often than absolutely necessary, since every opportunity to amend a law also affords those who originally opposed the law the opportunity to significantly alter, or even repeal the law.

C. The *Catron* Decision And Its Possible Results

It is likely that the U.S. Department of Justice will apply to the Supreme Court for review of the *Catron* decision. The Court is likely to grant certiorari to review the decision, because three circuit courts have rendered differing decisions regarding the application of NEPA to the ESA. In the 1982 case of *Pacific Legal Foundation*, the Sixth Circuit held that the Secretary of the Interior did not have to prepare an EIS when listing endangered species in accordance with the requirements of the ESA.[146] In *Douglas County*, the Ninth Circuit held that the Secretary is not required to prepare an EIS when designating critical habitat.[147] Finally, in the present case, the Tenth Circuit *Catron* court held that the Secretary of the Interior must comply with NEPA by filing an EA whenever he designates critical habitat under the ESA, if such action is a major federal action with a significant affect on the human

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[144] *Id.* at 40,425 (statement of Senator Muskie) ("Of course this legislation does not impose a responsibility or an obligation on those environmental impact agencies to make final decisions with respect to the nature and extent of the environmental impact of their activities.").

[145] *Pacific Legal Found.*, 657 F.2d at 840 ("The provisions of §§ 102 and 103 of the bill 'are not designed to result in any change in the manner in which [environment-enhancing agencies] carry out their environmental protection.'").

[146] *Id.* at 841.

[147] Douglas County v. Babbitt, 48 F.3d 1495, 1507 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

environment.[148] When circuit courts disagree in this manner about the application of the same federal law, the Supreme Court should provide a resolution for the sake of fair and equitable jurisprudence.[149]

If the Court does grant review of *Catron,* the Justices will be guided by the Court's own precedents in *United States v. SCRAP* and *Flint Ridge.* In those decisions, the Court held that NEPA serves a secondary role to other legislation, and that in conflicts between NEPA and other federal laws, the latter should prevail. If, based upon those cases and the facts of *Catron*, the Court overturns the *Catron* decision, the Court should delineate some guidelines to help federal agencies distinguish between those federal actions that trigger the requirements of NEPA and those environmental actions that do not.

CONCLUSION

The Tenth Circuit's decision in *Catron* presents a confounding problem for federal environmental agencies such as the Department of the Interior and the EPA. The decision breaks with the preceding line of cases, in both the U.S. circuit courts and the Supreme Court, which declared that NEPA does not apply to actions by federal agencies involving the protection of endangered species under the ESA.[150] However, there are very few situations in which a federal environmental agency's actions could result in a detrimental impact upon the physical environment. Therefore, the opportunities for future applications of the *Catron* holding are likely to be extremely limited. Jurisdictions outside the Tenth Circuit may find the *Catron* decision difficult to apply, because the *Catron* court did not fully discuss the factors of the county's case which it considered to be most persuasive. Neither did the court adequately explain how it established a nexus between the Secretary's designation of critical habitat and the property damage the county claimed would likely result from that federal agency action.

The county has not as of yet suffered any physical injury as a result of the Secretary's designation of critical habitat in Catron County,

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[148] Catron County Bd. of Comm'rs, N. M. v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1439 (10th Cir. 1996).

[149] *See generally* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Langenkamp v. C.A. Culp, 498 U.S. 42 (1990); Pryba v. United States, 498 U.S. 924 (1990); Mallard v. United States Dist. Court, 490 U.S. 296 (1989); Chan v. Korean Air Lines, 490 U.S. 122 (1989); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); and California Dep't of Corrections v. United States, 465 U.S. 1070 (1984).

[150] *See Pacific Legal Found.*, 657 F.2d 829; *Douglas County*, 48 F.3d 1495; Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, (1976).

New Mexico.[151] Given the statutory construction of the ESA, the flood damage that the county fears will occur because of the Secretary's designation of critical habitat will occur in fact only if two additional agency actions take place. First, if the Secretary fails to secure an agreement with the federal agency which controls Catron County's flood controls to mitigate the habitat-damaging effects of the flood control processes, the Secretary may order the flood controls shut down. Second, if the Secretary and the flood control agency cannot reach an agreement to mitigate the flood plan to protect the species and the critical habitat, the flood control agency may appeal the Secretary's final decision to the Endangered Species Committee.[152] If the seven-member ESC upholds the Secretary's decision, the Secretary may order the flood controls to close. If, however, the ESC overrules the Secretary the flood control agency will be free to proceed with its normal operations, and the plaintiff county's injury will not occur. Thus, the court's grant of the plaintiff's standing to sue in *Catron* was, at best, questionable.

Unfortunately, the statutory construction of the ESA did not serve its intended purpose to prevent the type of conflict which occurred in *Catron*. Hopefully, if the Supreme Court grants certiorari to review *Catron*, the Justices will structure a ruling that will guide the Secretary of the Interior and those affected by his actions under the ESA to resolve their competing interests through the administrative process which Congress established in the 1978 ESA Amendments. Over the past several years, the balance of power in the United States federal system has shifted in favor of the states. Alternative methods of dispute resolution, such as the consultation requirements of the ESA and the ESC appeal process, will help insure that conflicts between the federal government and the states regarding the designation of critical habitat will not prevent the nation from protecting and preserving its most endangered species.

NEPA serves a vital national interest by forcing federal agencies to take a "hard look" at their actions with regard to the detrimental effects they may have on the environment. Forcing environmental agencies to perform the same sort of evaluations may prove beneficial to those agencies and the environment by preventing undesired environmental degradation from actions which are otherwise intended

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[151] *See generally Catron*, 75 F.3d 1429.

[152] When Congress amended the ESA in 1978, it established the Endangered Species Committee, (a seven-member, quasi-legislative body), to serve as an adjudicative body to resolve conflicts between human economic values–such as the property damage claimed by Catron County–and the value of fulfilling the purposes of the Endangered Species Act by protecting and preserving the nation's endangered species for the next generation.

to protect the environment. Forcing environmental agencies such as EPA and the Department of the Interior to perform EISs on a regular basis may also provide a mechanism by which those environmental agencies can become more familiar with the practical difficulties other agencies encounter in preparing their own EISs, which may lead to better regulations and a more cooperative atmosphere throughout the entire environmental regulatory community. However, such relational benefits must not come at the cost of environmental losses.

The federal agencies charged with protecting the nation's environment must have the ability to respond quickly and effectively to environmental problems. Forcing such agencies to prepare EISs prior to taking any action intended to protect the environment may needlessly delay environmental protection efforts, where otherwise swift agency action could prevent environmental damage or contain environmental damage already done. Congress never intended the requirements of NEPA to prevent federal environmental agencies from performing their duties. Therefore, the courts should lend no credence to an interpretation of NEPA that subverts its basic goals of protecting and preserving the nation's environment.